HARVARD

LAW REVIEW

VOL. XXXI | JANUARY, 1918 | NO. 3

INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES

MARSHALL'S familiar *dictum* that "the power to tax involves the power to destroy"[1] has the vice, not uncommon among aphorisms, of being only partly true. It implies that where a state may tax at all, it may tax as it pleases. This would mean that those restrictions on the taxing power of the states which are incident to the federal system of government apply only to the subjects which may be selected for taxation and in no way concern the methods by which the amount of any tax is determined. This seems to be the opinion of Marshall, for, in denying the power of a state to include United States bonds among the kinds of property selected for taxation, he said: "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe."[2]

The questions which the great Chief Justice was discussing called for no such statements. His argument in *McCulloch* v. *Mary-*

[1] McCulloch *v.* Maryland, 4 Wheat. 316, 431 (1819).

[2] Weston *v.* City Council of Charleston, 2 Pet. 449, 466 (1829). See also Marshall's statement in Brown *v.* Maryland, 12 Wheat. 419, 439 (1827): "It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

land[3] and *Weston* v. *City Council of Charleston*[4] was in support of the proposition that a state could levy no tax whatever on an instrumentality of the federal government, even though the particular tax in issue might not appreciably interfere with that government. He was seeking some general rule which would relieve the courts of the necessity of considering the precise economic effect of every tax that came before them. This he found in the doctrine that a state, if it cannot tax a federal instrumentality into impotence, cannot tax it at all. Marshall was designating subject matters which he deemed entirely outside of state authority. He was not considering whether subject matters within the reach of the taxing power of a state could be subjected to whatever methods of assessment the state might choose to apply. His strong federalism, it would seem, would make him loth to assert by explicit decision that, if a state selects a proper subject for taxation, no method of assessment can make the tax an interference with the federal government or an encroachment on any of its powers.

This implication, however, has frequently been drawn from his too terse pronouncement. Many decisions with respect to the taxing power of the states have proceeded on the theory that inquiry need be directed only to the characteristics of the subject matter on which the tax is levied. If the subject is an instrumentality of the federal government, the state tax is invalid as an interference with the necessary effectiveness of that government. If the subject is not an instrumentality of the federal government, the tax cannot be held invalid as an interference with that government. If the subject matter is interstate commerce, the state tax is invalid as a regulation of such commerce. If the subject matter is not interstate commerce, the tax cannot be a regulation of such commerce. Such are the conclusions which find warrant in the language of many of the judges of the Supreme Court. But an examination of the decisions shows that the line of demarcation between valid and invalid state taxes is not so clear and straight as this language implies.

The so-called "subjects" of taxation with which the cases have had to deal have all been within the territorial jurisdiction of the state. They have been privileges granted by the state, or acts

---

[3] 4 Wheat. 316 (1819).

[4] 2 Pet. 449 (1829).

done, business conducted or property located within the state. The immunity of the subject from state taxation has been urged, not because it was geographically outside the state's jurisdiction, but because it was legally withdrawn from that jurisdiction by the creation of the federal system of government. The act in question might be an act of interstate commerce. The property might be owned by the United States or consist of the bonds of the United States. It is on the ground that the subject on which the tax is imposed is an agency of the United States or is an agency of interstate commerce, that what is within the territorial jurisdiction of the state is held to be nevertheless outside of its legal jurisdiction.[5]

In discussing questions of legal jurisdiction, the use of such spatial terms as "within" and "without" involves possible confusion. It might be better to say "subject to" and "immune from" the jurisdiction of the state. In this connection "jurisdiction" has the connotation of "legal power to deal with," rather than that of "area within which action may be taken." And "power" must be understood not to refer to power in general, to all kinds of power, but to indicate only the specific exercise of authority in question. The same act or business or property may be immune from one exercise of authority by the state, and subject to other exercises of state power. Thus a state may tax goods from other states still in the original package,[6] but may not forbid their sale.[7] Goods originating in other states become subjects of the taxing jurisdiction of the state into which they are brought, before they become subjects of its police jurisdiction. So a state may not tax bonds of the United States, but may punish their theft or determine disputes as to their ownership. The jurisdiction of the state over any given subject matter cannot be predicated generally.

---

[5] *Cf.* Marshall's statement in Brown *v.* Maryland, 12 Wheat. 419, 441 (1827):

"The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise."

[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

[7] Leisy *v.* Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681 (1890).

The question in each case is a specific one, limited to the particular exercise of state authority in issue.

The determination of the question whether any act or business or privilege or property is a subject of interstate commerce or is an agency of the federal government depends of course on its relation to interstate commerce or to the federal government. This relation may be direct or indirect, remote or immediate. The question is often one of degree. A somewhat arbitrary line has to be drawn. In drawing this line in respect to any mooted subject, economic considerations are always pertinent and frequently controlling. The doctrine of Chief Justice Marshall does not exclude economics from use as a test. His own arguments were frequently economic ones.[8] But his doctrine uses the economic test for the single purpose of determining whether the act or business or privilege or property on which the tax is levied is subject to or immune from the exercise of the state taxing power under consideration. If immunity exists, the immunity is complete. The tax is beyond state authority whether the amount imposed is a million dollars or a cent. If, however, the tax falls on an object within the power of the state, the power may be exercised to any extent that the state pleases. The power to tax at all involves the power to tax as the state wills. It is a power which "in its nature acknowledges no limits."

In spite of Marshall's reiteration of this position, it must be borne in mind that his attention was fixed on its negative aspects. Quite probably he assumed that any tax which in fact interfered with the operations of the federal government or encroached on any of its powers must necessarily be one levied on a subject with-

[8] See, for example, his argument in Brown *v.* Maryland, 12 Wheat. 419, 439 (1827) to establish that a tax on importers selling at wholesale is a tax on imports: "There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer." And on page 440: "A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation."

drawn from the jurisdiction of the state, *i. e.*, that the effect of the tax determined the nature of the subject on which it was levied. It is not to be credited, for example, that Marshall, if confronted with a situation in which domestic commerce was economically integrated with interstate commerce, would have permitted a tax on the domestic commerce which imposed any serious burden on the interstate commerce. The cases presenting this problem did not arise till long after his day. The press of economic facts has forced Marshall's successors to abandon his theory that a state may levy any tribute it pleases on a subject not immune from its taxing power. Taxes on subjects within the power of the state have been held invalid as regulations of interstate commerce, for the reason that the measure adopted for determining their amount took toll from interstate commerce.[9] No longer is the state taxing power an autocrat even in its own bailiwick. The absolute monarch has become a limited monarch. It has been subjected to the restraint of the maxim: *Sic utere tuo ut alienam non laedas.*

This change of doctrine has thus far been confined to the field of interstate commerce. It has not yet been applied to state taxes on proper subjects which nevertheless tap the value contributed by federal securities. But logically the new principle is as relevant to economic burdens on the federal borrowing power as to those on interstate commerce. The recent increase in the volume of federal securities will compel a reconsideration of any doctrine that permits a state to affect their value indirectly to an extent that it is forbidden to do directly. A review of the origin and development and modification of the notion that the power to tax is one which "in its nature acknowledges no limits" is therefore of more than merely historical or speculative interest.

It is readily apparent that a tax on a subject which is not an agency of interstate commerce or of the federal government may burden that commerce or that government more than other taxes levied directly on such an agency. A tax of one one-hundredth of one per cent on receipts from interstate commerce within the state may affect that commerce so slightly as to be inappreciable.

[9] Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910); Pullman Co. *v.* Kansas, 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910); Ludwig *v.* Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).

A tax on the franchise to be a domestic corporation whose amount is determined by applying the rate of five per cent to the receipts from interstate commerce within the state may impose a serious burden on that commerce. Yet, under the doctrine that the court will regard only the subject taxed and will pay no attention to the amount of the tax or to the measure by which it is determined, the infinitesimal burden will be held invalid and the serious one sustained. Thus taxes on subjects not themselves interstate commerce or an agency of the federal government may in a practical sense be regulations of that commerce and interferences with the operations of that government. Any purely formal division of subject matters of taxation into two mutually exclusive classes may sustain one tax and abate another though the two are identical in results.

Such formal classification, however, has speculative advantages and doubtless some practical ones. It establishes fairly definite rules and thereby simplifies the task of deciding cases and makes somewhat more certain the law.[10] But these gains may be won at the cost of some of the results which the Constitution is deemed to intend. There are competing considerations here, as in most problems of constitutional interpretation. This explains and also excuses the inconsistencies and contradictions which appear in the judicial treatment of the problem under consideration.

With the taxes which have been held to fall directly on interstate commerce or on instrumentalities of the federal government we are only incidentally concerned. The doctrines of the Supreme Court have been consistent and involve only the difficulty of determining whether the particular subject matter on which each tax is levied is or is not interstate commerce or an instrumentality of the federal government. These questions have provoked difference of opinion among the members of the Supreme Court, but

[10] For eulogies on the merits of this method of marking the dividing line between state and federal powers, see Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, 429–30 (1819), and Mr. Justice Nelson in Bank of Commerce *v.* New York, 2 Black 620, 634 (1863). The Chief Justice says: "If we measure the power of taxation residing in the State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied." And Mr. Justice Nelson observes that, when the limits between the powers and functions of the state and national governments are ascertained and fixed in accordance with the principles announced by Marshall, "all perplexity and confusion disappear."

all have agreed that a state tax which was levied directly on interstate commerce or on an instrumentality of the federal government was invalid however insignificant its effect.

When, however, we turn to the cases where the subject of taxation has admittedly been within the power of the state, we meet more fundamental differences of attitude. Some have thought that, if the subject taxed was within the zone of state authority, no tax thereon could be a regulation of matters beyond that zone. Others have held that the recognition that the subject was not immune from taxation did not compel the conclusion that the state might devise any method it pleased for determining the amount of the tax. It is the purpose of this article to review these diversities and to indicate as far as possible what considerations at present seem to be regarded by the Supreme Court as controlling.

I

Interferences with Federal Instrumentalities

The doctrine that a state cannot tax an instrumentality of the federal government is not based on any "express provision in the Constitution." It is said to rest "upon necessary implication" and to be "upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." [11] The soundness of the principle must be universally conceded. The only room for difference of opinion lies in its application.

An examination of the cases in which the doctrine has been applied shows that the Supreme Court has looked only to the subject matter on which the state tax fell. In *Weston* v. *City Council of Charleston* [12] the majority held that the tax in question was imposed directly on securities of the federal government — "on the contract subsisting between the government and the individual" — and was therefore invalid. Mr. Justice Thompson, dissenting, insisted that the tax was on income. After quoting from the "Federalist," he observed that "it never entered into the discriminating mind of the writer referred to that merely investing

[11] The Collector *v.* Day, 11 Wall. 113, 127 (1871).

[12] 2 Pet. 449 (1829).

property, subject to taxation, in stock of the United States, would withdraw the property from taxation." [13] The property existed before its investment in stock by the national government.

"In the case now before us, the tax is not direct upon any means used by the government to carry on its operation. It is only a tax upon property acquired through one of the means employed by the government to carry on its operations, *viz.*, the power of borrowing money upon the credit of the United States; and it is not perceived how any just distinction can be made in this respect, between bank stock and stock of the United States; both are acquired through the medium of means employed by the government in carrying on its operations; and both are held as private property; and it is immaterial to the present question in what manner it was acquired." [14]

In illustration of his point, the dissenting justice remarked that, though the states cannot tax the mint, they can tax the money coined at the mint, when held and owned by individuals. And he concluded by saying:

"The unqualified proposition that a State cannot directly or indirectly tax any instrument or means employed by the general government in the execution of its power, cannot be literally sustained. Congress has power to raise armies, such armies are made up of officers and soldiers, and are instruments employed by the government in executing its powers; and although the army, as such, cannot be taxed, yet it will not be claimed that all such officers and soldiers are exempt from State taxation. Upon the whole, considering that the tax in question is a general tax upon the interest of money on loan, I cannot think it any violation of the Constitution of the United States to include therein interest accruing from stock of the United States." [15]

But against this the majority opinion by Chief Justice Marshall declared that "the tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution." [16] Thus it is clear that the dispute related to the subject which the state had selected for taxation. Mr. Justice Johnson, who also wrote a dissenting opinion, conceded: "If I could bring myself to consider this question in the form in

---

[13] 2 Pet. 449, 477–78 (1829).

[14] 2 Pet. 449, 479 (1829).

[15] 2 Pet. 449, 480 (1829).

[16] 2 Pet. 449, 469 (1829).

which it is considered by the majority of the court, I should certainly concur in the opinion that the tax was unconstitutional." [17]

It is rather difficult to regard the tax involved in the Weston Case as a tax on income. The ordinance under which it was levied reads as follows:

> ". . . the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted), twenty-five cents upon every hundred dollars." [18]

The most natural inference from this language is that the tax is on property from which income is received, with a deduction allowed to the taxpayer of an amount equivalent to that on which he may be paying interest. The decision stands for the proposition that the subject of taxation in question is not some abstract concept of property distinct from the specific kinds of property which the taxpayer may hold, but is that specific property. If that property is an obligation of the United States to pay money, it is an agency of the United States, since it is the concrete expression of the power to borrow. Any tax on such agency is wholly outside the power of the state.

This doctrine with regard to property was later applied in *Bank of Commerce* v. *New York City* [19] to the capital of a corporation. The statute there provided that the capital stock of every corporation liable to taxation shall be assessed at its actual value. Mr. Justice Nelson, in refuting the contention that *Weston* v. *City Council of Charleston* [20] was not in point because in that case there was discrimination against the stock of the United States, laid down the doctrine that a "court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised." [21] Therefore, he says, the Weston Case necessarily

[17] 2 Pet. 449, 472 (1829).
[18] 2 Pet. 449, 450 (1829).
[19] 2 Black 620 (1862).
[20] Note 4, *supra*.
[21] 2 Black 620, 631 (1862).

decided that the state could not tax federal securities at all, even though it taxed all other securities as well.

After the Bank of Commerce decision, New York changed its statute, so as to read: "All banks, banking associations, etc., shall be liable to taxation on a valuation equal to the amount of their capital stock paid in, or secured to be paid in, and their surplus earnings, etc." [22] In *Bank Tax Case* [23] the Supreme Court held that this tax also was on the capital and therefore on the property in which the capital was invested, and that, in so far as this property consists of stocks of the United States, the case is indistinguishable from the Bank of Commerce Case. Mr. Justice Nelson in the opinion for a unanimous court thus identified the capital of the corporation with the property in which it was invested:

> "Now, when the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the *corpus* or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but, in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The Legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and, when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law." [24]

The succeeding sentence of the opinion foreshadows the distinction which the court is soon to draw. The learned justice states that he has looked through all the statutes of New York relating to the

[22] Quoted in Bank Tax Case, 2 Wall. 200, 206 (1865).

[23] 2 Wall. 200 (1865).

[24] 2 Wall. 200, 208–09 (1865). For another statement to the same effect see note 169, *infra*.

taxation of moneyed corporations from 1823 to the statute under review, and notes that "it will be seen in all of them that the tax is imposed on the property of the institutions, as contradistinguished from a tax on their privileges or franchises." [25]

1. *Taxes on Privileges*

Four years later the court decided three cases [26] in which the majority held that the tax was not on property but on the franchise to be a corporation, and that it was therefore valid in spite of the fact that it was measured in part by property invested in federal securities. Chief Justice Chase and Justices Miller and Grier dissented, being of the opinion that the tax was a tax on the property and not on the franchises and privileges of the corporation.

Two of the cases were from Massachusetts. The Massachusetts court had declared that, if the taxes were on property, they were invalid under the state constitution. That court, however, sustained the taxes as on "commodities" under the somewhat peculiar interpretation put on that term contained in the Massachusetts constitution. The definition of "commodities" uniformly given by the Massachusetts court was that it signifies "convenience, privilege, profit and gains." [27] Mr. Justice Clifford for the majority of the Supreme Court ruled that the decisions of the state court "must be regarded as conclusive authorities that the tax in this case is a tax on the privileges and franchises of the corporation and not a tax on the property." [28] The minority evidently saw no ground on which to hold the taxes unconstitutional except the denial that the subject of taxation was a privilege.

The two cases differed slightly from each other. *Provident Savings Institution* v. *Massachusetts* [29] involved a requirement that all institutions for savings incorporated under the laws of the state shall pay "a tax on account of their depositors of three-fourths of one per cent per annum on the amount of their deposits." [30]

---

[25] 2 Wall. 200, 209 (1865).

[26] Society for Savings *v.* Coite, 6 Wall. 594 (1868); Provident Savings Institution *v.* Massachusetts, 6 Wall. 611 (1868); Hamilton Manufacturing Co. *v.* Massachusetts, 6 Wall. 632 (1868).

[27] 6 Wall. 632, 640 (1868).

[28] 6 Wall. 611, 628 (1868).

[29] 6 Wall. 611 (1868).

[30] 6 Wall. 611, 620 (1868).

Hamilton Manufacturing Co. v. *Massachusetts* [31] had to do with a statute requiring certain classes of corporations to pay, in lieu of all other taxation, a tax of one and one-sixth per cent on the excess of the market value of their capital stock over the value of their real estate and machinery. The complaining corporation was denied exemption for the part of that excess value which was contributed by $300,000 of United States bonds owned by it. The Provident Savings Institution was denied any deduction from its $8,047,652.19 of deposits on account of $1,327,000 invested in the public funds of the United States. On the same day, in *Society for Savings* v. *Coite*,[32] the court declined to permit a Connecticut savings bank to deduct from a tax of one half of one per cent on its deposits of $4,758,273.37 the sum of $500,161 which "was then invested and held in securities of the United States, declared by act of Congress to be exempt from taxation." [33]

The Connecticut corporation had no capital stock, which seemed to be regarded by Mr. Justice Clifford as significant in establishing that the tax could not be one levied on property. In the Provident Savings Case the learned justice makes the questionable assertion that "there is no necessary relation between the average amount of the deposits and the amount of property owned by the institution." [34] In that case also he said: "The amount of the tax does not depend on the amount of the property held by the institution, but it depends upon the capacity of the institution to exercise the privileges conferred by the charter." [35] He seems to be assuming that uninvested deposits of the bank are for some reason not property of the bank. Manifestly a corporation without capital stock may still have legal title to property, and a tax demanded from the corporation may be levied either on its property or on its franchise as the state chooses. The Massachusetts taxes were plainly intended to be levied on the franchises as "commodities." But the Connecticut statute is substantially similar in wording to that held in *Bank Tax Case* [36] to be one imposing a tax on property. The New York statute involved in that case said that the banks "shall be liable to taxation on a valuation equal to" capital stock and surplus; the Connecticut statute said

[31] 6 Wall. 632 (1868).
[32] 6 Wall. 594 (1868).
[33] 6 Wall. 594, 604 (1868).
[34] 6 Wall. 594, 631 (1868).
[35] 6 Wall. 594, 630 (1868).
[36] Note 23, *supra*.

that the banks shall pay to the state "a sum equal to" a certain percentage of their deposits. Neither statute specifically named the franchise as the subject of taxation. Nor does it seem that the decision of the Massachusetts court holding that the taxes imposed by its statute were not property taxes, as that term is used in the state constitution, is necessarily conclusive of the "subject" on which the tax is levied from the standpoint of its effect on instrumentalities of the federal government. If the test of whether or not the tax is an interference with a federal instrumentality is the "subject" on which the tax is levied, the federal Supreme Court ought to determine independently any dispute as to what that subject is. Otherwise a state by mere use of words can decide for itself whether or not it is interfering with the federal government. Yet this very power on the part of the state is inherent in the doctrine that, in determining whether a tax encroaches on federal authority, the court will look only to the subject taxed and will not regard the economic effect of the measure by which the amount of the tax is determined.

Such, nevertheless, is the doctrine clearly implied by Chief Justice Marshall and specifically sanctioned by the actual decisions in the three cases under review. Corporate franchises, says Mr. Justice Clifford, are legal estates, and not mere naked powers granted to a corporation. They are "as much the legitimate subjects of taxation as any other property of the citizens within the sovereign power of the State." [37]

"All trades and avocations by which the citizens acquire a livelihood may also be taxed by the State for the support of the State government. Power to that effect resides in the State independent of the Federal government, and is wholly unaffected by the fact that corporation or individual has or has not made investments in Federal securities. Unless such be the rule, the two systems of government, State and Federal, cannot both continue to exist, as the States will be left without any means of support or of discharging their public obligations." [38]

And with respect to the Connecticut statute he says:

"Reference is evidently made to the total amount of deposits on the day named, not as the subject-matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should con-

[37] 6 Wall. 594, 638 (1868).

[38] 6 Wall. 594, 638–39 (1868).

tribute to the public burdens. . . . Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." [39]

These three decisions were the basis of *Home Insurance Co.* v. *New York* [40] which held that a tax on a corporate franchise, whose amount is determined by applying to the corporate stock the statutory rates for each one per cent of dividend declared, may include in this measure that part of the capital stock which is invested in United States bonds and the dividends thereon. Mr. Justice Field states the legal principle as follows:

"The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal." [41]

Here seems to be a definite statement that, if the state finds that the capital of the bank as property is exempt from taxation because invested in federal securities, it may make good its loss from this source by taxing the franchise and basing the amount of the tax on the same capital held immune from the former tax.[42] And yet earlier in this very opinion it is declared:

---

[39] 6 Wall. 594, 608 (1868).

[40] 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889).

[41] 134 U. S. 594, 600, 10 Sup. Ct. Rep. 593 (1889).

[42] This distinction between taxes directly on property and taxes on franchises measured by the value of property has been applied in determining whether federal taxes were interferences with the powers of the states. In Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1895), it was held that a general federal tax on incomes could not apply to incomes from state and municipal securities, because this would be an interference with the powers of the states. But in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, 166 (1911), the federal tax on corporations measured by their income was held valid as an excise tax, and in assessing the amount of the tax the court allowed the inclusion of income from state securities. The argument to the contrary was said to confuse "the measure of the tax upon the privilege

"Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation provided the same result is effected — that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained." [43]

It is hardly surprising that such inconsistencies met with dissent. Very simply and without argument Mr. Justice Miller expresses his disagreement:

"Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the Statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company." [44]

The doctrine of the absolute power of the state over taxation of corporate privileges was later applied to taxation of inheritances. In *United States* v. *Perkins*,[45] it was held, Mr. Justice Harlan alone dissenting, that a state may tax a bequest to the federal government, since the tax is not upon the property itself, but upon its transmission by will or descent. It is "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use." [46] The statute

---

with direct taxation of the state or of the thing taxed." After referring to the Home Insurance Case, Mr. Justice Day, speaking for a unanimous court, declared:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which, as such, could not be directly taxed. . . .

". . . There is no rule which permits a court to say that the measure of a tax for the privilege of doing business, where income from property is the basis, must be limited to that derived from property which may be strictly said to be actively used in the business."

[43] 134 U. S. 594, 598, 10 Sup. Ct. Rep. 593 (1889).

[44] 134 U. S. 594, 607, 10 Sup. Ct. Rep. 593 (1889).

[45] 163 U. S. 625, 16 Sup. Ct. Rep. 1073 (1896).

[46] 163 U. S. 625, 628, 16 Sup. Ct. Rep. 1073 (1896).

was said not to be an attempt to tax the property of the United States, "since the tax is imposed upon the legacy before it reaches the hands of the government." [47] This is a somewhat novel use of the doctrine that time may be of the essence. Here again the court looks at what was taxed, entirely disregarding where the burden fell.[48]

Ten years later it was held in *Plummer* v. *Coler*,[49] Mr. Justice White alone dissenting, that a state inheritance tax may lawfully be imposed on the bequest to an individual of a life interest in United States bonds. The principle underlying this decision was thus stated by Mr. Justice Shiras:

> "We think the conclusion, fairly to be drawn from the State and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed." [50]

Counsel for the legatee in this case had urged upon the court the economic argument:

> "The States have no power to inpose any tax or other burden which would have the effect to prevent or hinder the government of the United States from borrowing such amounts of money as it may require for its purposes, on terms as beneficial and favorable to itself, in all respects, as it could do if no such tax were imposed by the State." [51]

To this Mr. Justice Shiras answered that the recognition of the doctrine would require the overruling of earlier decisions.

> "For, if it were our duty to hold that taxation of inheritances, in the cases where United States bonds pass, is unlawful because it might in-

---

[47] 163 U. S. 625, 630, 16 Sup. Ct. Rep. 1073 (1896).

[48] See United States *v.* Fox, 94 U. S. 315 (1877), holding that a state may forbid a devise of land to the United States. It is held also that a federal inheritance tax may be applied to a legacy to a municipal corporation, Snyder *v.* Bettman, 190 U. S. 249, 23 Sup. Ct. Rep. 803 (1903). But a federal income tax cannot be applied to income received by a city, United States *v.* Baltimore & Ohio Railroad Co., 17 Wall. 322 (1873).

[49] 178 U. S. 115, 20 Sup. Ct. Rep. 829 (1900).

[50] 178 U. S. 115, 134, 20 Sup. Ct. Rep. 829 (1900).

[51] 178 U. S. 115, 119, 20 Sup. Ct. Rep. 829 (1900).

juriously affect the demand for such securities, it would equally be our duty to condemn all State laws which would deter those who form corporations from investing any portion of the corporate property in United States bonds." [52]

He went on further to argue that the effect of the inheritance tax in question on the federal borrowing power is less serious than that of the franchise taxes which have been sustained, since, on account of the low interest yield, only a few individuals invest in United States bonds. Mention is made also of the fact that "no inconsiderable portion of the United States loans is taken and held, as everyone knows, in foreign countries, where doubtless it is subjected to municipal taxation." [53]

"While we cannot take judicial notice of the comparative portions of the government securities held by individuals, by corporations, and by foreigners, we still may be permitted to perceive that the mischief to our national credit, so feelingly deplored in the briefs, caused by State taxation upon estates of decedents, would be inappreciable, and too remote and uncertain to justify us now in condemning the tax system of the State of New York." [54]

Thus the economic argument is relied on to show that the legal doctrine of determining taxability or non-taxability according to the subjects on which the tax is levied does not cause the serious economic injury to federal authority that is contended. The facts adduced in support of the position are facts which change with time. The argument does not directly meet the contention of counsel

". . . that individual persons will be driven to consider, when making their investments, whether they can rely on their legatees or heirs receiving United States bonds unimpaired by state action in the form of taxation; and that if it should be held by this court that such taxation is lawful, capital would not be invested in United States bonds on terms as favorable as if we were to hold otherwise." [55]

Nor can the contention be dismissed by economic argument. Mr. Justice Shiras is entirely correct in saying that the same contention would require the overruling of earlier decisions sustaining taxes on corporate franchises. He must therefore be understood

---

[52] 178 U. S. 115, 136, 20 Sup. Ct. Rep. 829 (1900).

[53] *Ibid.* [54] *Ibid.* [55] *Ibid.*

as declaring that the mere fact that federal securities would be more advantageously disposed of, if they must always be excluded from every computation to determine the amount of a tax, does not make the tax in a legal sense a burden on a federal instrumentality.

The contention of counsel confuses two questions. One is whether the market for federal securities is less favorable after the state tax than before. The other is whether the market for federal securities is more favorable if the tax takes toll from all other investments but not from federal securities. There can be no doubt as to the economic answer to the second question. Plainly, if the tax is declared inapplicable in any form to federal securities, the relative position of those securities in the market is improved. The result of imposing burdens on competing securities and leaving federal securities free is to confer a benefit upon the latter. This is what happens when non-discriminatory state taxes are held inapplicable to federal securities. But whether the state tax on franchises or on inheritances, if measured indiscriminately by all investments, really hurts the federal borrowing power more than if no such taxes were levied at all is a more difficult question. It is a question which the abandonment in 1910 of the doctrine that a tax on a proper subject can never be an encroachment on federal authority [56] may force upon the consideration of the court. Mr. Justice Holmes, who opposed the abandonment of this doctrine, made the point that any effect on interstate commerce of a complete prohibition against economically related domestic commerce is really not a burden, but simply the denial of a collateral benefit. "If foreign commerce," he said, "does not pay its way by itself, I see no right to demand [for the foreign corporation] an entrance for domestic business to help it out." [57] So also it may be urged that, if federal instrumentalities are not actually impeded by a state tax, there should be no right to claim for them a collateral benefit from the operation of state laws. If the court abandons the test of "subjects" in cases where the tax falls on what has been held a proper subject, it may abandon it also where the tax falls on what has been held to be an improper subject. If it turns from somewhat artificial legal distinctions to practical economic considerations, it may

[56] See cases cited in note 9, *supra*.

[57] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1909).

examine afresh the whole topic. This possibility will be discussed after the cases on interstate commerce have been dealt with. It is of course obvious that the frank substitution of the test of economic effect for that of the legal subject on which the tax is levied will not necessarily establish rules that will validate the kind of taxation previously held unconstitutional.

2. *Taxes on Property*

In the foregoing cases the essential basis of the decision is that the state was imposing the tax on a privilege which it might have withheld entirely and which therefore it may tax as it pleases. The subject taxed came into existence only by grace or favor of the state, and the state by taxing its own creature cannot be interfering with an instrumentality of the United States. The same reason would support state taxation of the full value of shares of corporate stock in domestic corporations with no deduction for such part of that value as may be represented by corporate investment in federal securities. The decisions in favor of such taxation, however, have been based on the somewhat broader ground that a tax on the share is not a tax on the property of the corporation and therefore not on the federal securities in which some or all of that property may be invested.

The point was first involved in *Van Allen* v. *Assessors*,[58] which held that the state could tax shares of stock in national banks though the capital of the banks was all invested in stocks and bonds of the United States. This decision, however, was based on an interpretation of a congressional statute permitting the taxation of the shares. The majority were of opinion that the statute meant that the state might tax the shares at their full value. The minority, on the other hand, thought that the only purpose of the statute was to preclude the inference that the shares must be entirely exempt from state taxation on account of the functions performed by the banks as instruments of the national government, and that it had no bearing on the question whether the value assigned to the shares might include such as they derived from the federal securities in which the capital of the bank was invested. Chief Justice Chase, who, with Justices Wayne and Swayne dis-

[58] 3 Wall. 573 (1866).

sented, referred to the decisions holding that a tax on the capital of a bank must not include such part of that capital as is invested in federal securities,[59] and declared that the same principle should be applied to a tax on the shares. If the contrary were admitted, he said:

> "It would follow that the legislature of New York by merely shifting its taxation from the capital to the shares, might have avoided the whole effect of the exemptions sanctioned by the decisions just cited. The same tax on the same identical property, without any exemption of national securities, might have been assessed and collected by adopting the simple expedient of assessment on the shares of capital, instead of on the aggregate of capital — on the parts instead of on the whole. . . .
>
> We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition. To do so would, in our judgment, deprive the decisions just cited of all practical value and effect, and make the exemption from State taxation of national securities held by banks as investment of capital, wholly unreal and illusory." [60]

And to this he added: "It may well be questioned, in our judgment, whether Congress has power under the Constitution to authorize state taxation of national securities, either directly or indirectly." [61] Thus the dissenting judges clearly indicated their conviction that, though the shares might be a proper subject of taxation, the state could not, in assessing their value for this purpose, adopt a measure which would result in imposing on federal securities the same burden as a direct levy on those securities. This position, however, has not met with sanction in later decisions.

In *Cleveland Trust Co.* v. *Lander* [62] the contention was made that a tax on the shares of stock in a bank chartered by the state "being equivalent to a tax on the property of the trust company, there must be deducted from the value of the shares that portion of the

---

[59] Bank of Commerce *v.* New York City, note 19, *supra;* Bank Tax Case, note 23, *supra.*

[60] 3 Wall. 573, 593 (1866).

[61] *Ibid.*

[62] 184 U. S. 111 (1902). The reporter states that "Mr. Justice Harlan did not hear the argument, and took no part in the decision." There was no dissent in the case. Chief Justice Chase and Justices Wayne and Swayne who dissented in the Van Allen Case, note 58, *supra,* were no longer on the bench.

capital of the company invested in United States bonds."[63] The court answered that "the contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders."[64] There was a *non-sequitur* in basing this decision, as the court did, on the Van Allen Case, for the federal statute interpreted as sanctioning the taxation of shares in national banks at their full value has no necessary bearing on the taxation of shares in state banks. It was still open for the court to say that the question before it involved general principles inherent in the federal system of government. Without questioning the Van Allen Case it might have held that, though shares in state banks were proper subjects of state taxation, the state must exclude from their value such part as was contributed by the federal securities owned by the bank, since otherwise the state would by indirection impose on the federal borrowing power, burdens which had been held unconstitutional when imposed directly. But the court was regarding the subject on which the tax fell and not the elements of value in the measure by which its amount was determined. As pointed out earlier, the opinion made no mention of any power which the state had over these shares by reason of the fact that they were shares in a domestic corporation which the state might have declined to create. It seems clear that the court would have applied the same doctrine to an Ohio tax of shares in a corporation created by a sister state.[65]

The distinction set forth in the Van Allen Case and followed in *Cleveland Trust Co.* v. *Lander* was grudgingly recognized in *Home Savings Bank* v. *Des Moines*.[66] This case involved an Iowa statute which provided that shares of stock in state banks should be assessed to the banks and not to the individual stockholders. The majority held that the tax was imposed on the property of the bank and not on that of the stockholders, and that therefore the value of United States bonds owned by the bank must be deducted from the assessment.[67] It was conceded in the opinion that a contrary

---

[63] 184 U. S. 111, 114–15, 22 Sup. Ct. Rep. 394 (1902).

[64] 184 U. S. 111, 115 (1902). In Mead *v.* Commissioners, dealt with in the opinion in People *ex rel.* Duer *v.* Commissioners of Taxes, 4 Wall. 244 (1867) the same point had been decided. See p. 353, *infra*.

[65] See Sturges *v.* Carter, 114 U. S. 511, 5 Sup. Ct. Rep. 1014 (1885).

[66] 205 U. S. 503, 27 Sup. Ct. Rep. 571 (1907).

[67] In reaching this interpretation reliance was placed on the difference between

conclusion as to the subject on which the tax was levied would have required a contrary decision under the doctrine of the Van Allen Case. But Mr. Justice Moody gives the impression that he thinks the Van Allen Case was wrongly decided. Referring to that case he says:

---

the method of taxing shares in state banks and that of taxing shares in national banks. With respect to the latter, the Iowa statute provided that they should be "assessed to the individual stockholders at the place where the bank is located." Though the national banks, like the state banks, were liable for the payment of the taxes, the national banks were given a right of reimbursement from the stockholders, and were given a lien on the stock and unpaid dividends, with authority to sell the stock to satisfy the lien in case the dividends were not sufficient to furnish reimbursement for the tax. No such right of reimbursement was given to the state banks, and the court believed that they could not have "by any possibility a common-law right to recover the tax paid from the shareholders." Continuing, the opinion declared: "The law imposes no obligation on the shareholder. In paying the tax the corporation has paid its own debt, and not that of others, and there is nothing in such payment from which the law can imply a promise of reimbursement. These taxes, therefore, are not to be paid by the banks as agents of their stockholders, but as their own debt, and, unless it is supposed that the law requires them to pay taxes upon property which they do not own, the taxes must be regarded as taxes upon the property of the banks."

In the brief for the state it was insisted that the Supreme Court must accept as binding the interpretation put upon the state statute by the state court. This was the contention which Mr. Justice Clifford accepted in Hamilton Manufacturing Co. *v.* Massachusetts (see p. 331, *supra*). In the Des Moines Case Mr. Justice Moody does not directly meet the contention. After stating his conclusion that the tax is on the property of the banks, he says: "This we think is consistent with the interpretation of the law by the supreme court of Iowa, which sustained the tax on grounds which will presently be considered." Those grounds are that the tax is on the shares and not on the property of the bank. In the final paragraph of the opinion, the learned justice says: "We regret that we are constrained to differ with the supreme court of the state on a question relating to its law. But, holding the opinion that the law directly taxes national securities, our duty is clear." Thus plainly the Supreme Court rejects the interpretation of the state court as to the subject on which the tax was levied.

Mr. Justice Moody makes it clear that the question of the subject on which the tax is imposed is not answered by ascertaining the person from whom payment is required. He expressly declares his approval of First National Bank *v.* Kentucky, 9 Wall. 353 (1870), and the cases following it, which hold that a tax on the shares is not to be "deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders." These cases hold also that requirement of such payment from a national bank is not an interference with the bank as an instrumentality of the national government. But all the cases with respect to state taxation affecting national banks are controlled by the congressional permission (15 STAT. AT L. 34, chap. 7) that the real estate of the banks and the shares of their stockholders may be taxed by the states. See Talbott *v.* Silver Bow County Commissioners, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891), and Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 19 Sup. Ct. Rep. 597 (1899).

"In an opinion in which Justices Wayne and Swayne joined, Chief Justice Chase dissented from the judgment upon the ground that taxation of the shareholders of a corporation in respect to their shares was an actual though an indirect tax on the property of the corporation itself. But the distinction between a tax upon shareholders and one on the corporate property, although established over dissent, has come to be inextricably mingled with all taxing systems, and cannot be disregarded without bringing them into confusion which would be little short of chaos." [68]

The Van Allen Case is accepted as having "settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporation owns." [69] The result of the various decisions is said to be that "although taxes by states have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities." [70] The fact that a tax on the corporation "measured by the value of the shares in it" is "equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares " [71] is dismissed as immaterial.

"But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose would have the same ultimate incidence." [72]

The statement that the question is "one of power, and not of economics" invites analysis. Mr. Justice Moody makes it to dismiss the contention that the tax before him imposes no more serious burden on the borrowing power of the federal government than do other taxes held lawful. But at the same time he seems to imply that because of the economic effects it would have been wise not to permit those taxes on shares which have taken account of the value due to federal securities owned by the corporation.

[68] 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907).

[69] *Ibid.*

[70] 205 U. S. 503, 519, 27 Sup. Ct. Rep. 571 (1907).

[71] *Ibid.*

[72] Note 71, *supra.*

The final paragraph of his opinion might have been applied equally well to the cases involving taxation of shares.

> "If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation, that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed whenever they are owned by a corporation, and the national credit has no defense against a serious wound." [73]

Yet Iowa by changing its statute and assessing these shares of stock to the stockholders might inflict this very wound. Mr. Justice Moody employs an economic argument to show that the tax on shares assessed to the corporation is as serious an interference with the federal borrowing power as is a tax on the capital of the bank. Though he declines to use the economic argument to put the tax before the court in the class of those that have been held invalid, he relies on economic considerations to reinforce his conclusion that it properly belongs with those that have been held invalid.

3. *Taxes Discriminating against Federal Instrumentalities*

One further possibility of indirect encroachment on the federal borrowing power remains to be considered. It is settled that the franchises of domestic corporations and the shares in state and national banks are subject to taxation with no diminution in the assessment of their value by reason of corporate investment in United States bonds. Suppose a state devises some plan whereby the franchises and the stock of corporations owning United States bonds are taxed more heavily than those of corporations having no such investments. Suppose it discriminates against such stock in favor of chattels or real estate. Would it not thereby put impediments in the way of the federal borrowing power? There can be no doubt that a state ought not to be permitted to adopt methods of assessment which intentionally and systematically bear more heavily on franchises and stock of corporations owning federal securities than on other property. This would seem a necessary corollary from the cases holding that a state cannot discriminate against interstate commerce by selecting for taxation property or

---

[73] 205 U. S. 503, 521, 27 Sup. Ct. Rep. 571 (1907).

sales of property of extra-state origin.[74] But it is of course not feasible to require a state to adopt a uniform method of assessing all the various kinds of property subject to taxation. May not the state, therefore, in exercising the discretion which must necessarily be allowed it, take heavier toll from values contributed by federal securities than from those derived from other sources?

Some methods of accomplishing such results are clearly foreclosed by congressional legislation and the decisions thereunder. When Congress on February 25, 1863, passed the first act providing for the organization of national banks,[75] it made no provision for allowing state taxation of the shares. But the National Banking Act of 1864[76] permitted such taxation, subject to two restrictions: (1) that the rate should not be greater than that "assessed upon other moneyed capital in the hands of individual citizens of such state"; and (2) that "the tax so imposed under the laws of any state upon the shares of the associations shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the state where such association is located." This second qualification was omitted from the reënactment of the statute in 1868.[77]

Under these statutes it was held in *Van Allen* v. *Assessors*[78] that the state discriminated against shares in national banks by taxing them at their full value when no tax was imposed on shares in state banks. The fact that the capital of state banks was taxed was held insufficient to overcome this inequality, since, in assessing the value of the capital, the state was required to deduct such part as was invested in United States bonds. In *People* v. *Weaver*[79] a New York statute, which permitted a debtor to deduct the

---

[74] Welton *v.* Missouri, 91 U. S. 275 (1875); Darnell & Son *v.* Memphis, 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908).

[75] 12 STAT. AT L. 665.

[76] 13 STAT. AT L. 111.

[77] 15 STAT. AT L. 34; Rev. St. § 5219 (U. S. Comp. St., 1901, 3502).

[78] 3 Wall. 573 (1866). This is the same case cited in note 58, *supra*. Of the point for which the case is here cited, the opinion said: "This is an unimportant question, as the defect may be readily remedied by the state legislature." For a different attitude towards the exemption of shares of stock where the capital of the corporation is taxed, see note 158, *infra*. Almost the entire opinion in the Van Allen Case is devoted to the question whether, in assessing the shares of national banks, there must be deduction for the federal securities owned by the bank.

[79] 100 U. S. 539 (1880).

amount of his debts from the assessment of other moneyed capital but not from shares of bank stock, was held void as to the shares of national banks. The decision cannot proceed on the ground that there was discrimination against national banks in favor of state banks, since no deduction for debts was allowed from any bank stock, state or national. The term "moneyed capital" is plainly taken in a broader sense than "capital invested in banks."

> "Nor can it be denied that, inasmuch as nearly all the banks in that State and in all others are national banks, that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress in passing the Act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent discrimination between national bank shares and other moneyed capital, to authorize such a result." [80]

In interpreting the statute, it was held that the Act of Congress has reference to the entire process of assessment and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. This doctrine was applied in *Pelton* v. *Commercial Bank of Cleveland* [81] to prevent the assessment of shares in national banks at their full value when there was intentional and systematic undervaluation of all other moneyed capital. That "moneyed capital" is assumed to include other capital than that invested in banks is clear from the reference to testimony in the case to the effect that the assessors "had assessed bank shares generally higher than other personal property, including, of course, other moneyed capital; and that they had assessed the shares of the national banks higher than private banks, and that it was their aim to do so." [82] Since there were the two kinds of discrimination, the case might have been rested solely on the ground that the methods of assessment favored state banks at the expense of

[80] 100 U. S. 539, 543 (1880).

[81] 101 U. S. 143 (1880). To the same effect as Pelton *v.* Bank is Cummings *v.* Merchants' National Bank of Toledo, 101 U. S. 153 (1880), decided the same day.

[82] 101 U. S. 143, 147 (1880).

national banks. But the reason given for the decision was the discrimination in favor of "other moneyed capital," and the inference is unmistakable that some personal property other than bank shares was regarded by the court as "moneyed capital."

The statute involved in *People* v. *Weaver* [83] came before the court again in *Supervisors of Albany County* v. *Stanley* [84] and *Hills* v. *National Albany Exchange Bank*,[85] and it was held that the state must permit the deduction of debts from the assessment of shares of national banks, even though the other moneyed capital from which such deduction was allowed did not include other bank stock.[86] On the same day was decided *Evansville National Bank* v. *Britton*,[87] which arose under a statute of Indiana. Counsel for the county treasurer sought to distinguish the Indiana statute from that of New York on the ground that New York permitted deduction of debts from all personal property except bank stock, while Indiana allowed the deduction only from "credits." But the court replied that, if one of the statutes "is more directly in conflict with the Act of Congress than the other, it is the Indiana Statute." [88]

"The Act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana Statute, from which *bonâ fide* debts may be deducted, all mean moneyed capital invested in that way." [89]

---

[83] Note 79, *supra*.

[84] 105 U. S. 305 (1882).

[85] 105 U. S. 319 (1882).

[86] These cases held also that the statute under which the tax on shares in national banks was levied was not itself unconstitutional. No relief was given to complainants who had no debts to deduct. And those who had debts to deduct were not granted an abatement of the whole of the tax on their shares in national banks, but only of that part of the assessment due to the state's disallowance of deduction for their debts.

[87] 105 U. S. 322 (1882).

[88] 105 U. S. 322, 323 (1882).

[89] 105 U. S. 324 (1882).

Here is a definite statement that, though "other moneyed capital" may not include all personal property, it certainly includes other personal property than that invested in bank stocks.

The same interpretation was adopted three years later in *Boyer* v. *Boyer*,[90] in which an injunction was sought to restrain the levy of a county tax on shares of stock in a national bank. By demurrer to the bill it was confessed that a large amount of other kinds of property was exempt from county taxation. The state court had held that this was immaterial, since such exemptions did not include the shares of state banks and savings institutions. But Mr. Justice Harlan replied that this decision proceeded upon a misconstruction of the Act of Congress. He interpreted the statute as follows:

> "Capital invested in national bank shares was intended to be placed upon the same footing of substantial equality in respect of taxation by State authority, as the State establishes for other moneyed capital in the hands of individual citizens, however invested, whether in State bank shares or otherwise. As the Act of Congress does not fix a definite limit as to the percentage of value, beyond which the States may not tax national bank shares, cases will arise in which it will be difficult to determine whether the exemption of a particular part of moneyed capital in individual hands is so serious or material as to infringe the substantial rule of equality. But unless we have failed to comprehend the scope and effect of the taxing laws of Pennsylvania, the present case is not of that class." [91]

The demurrer was overruled and the defendants were put to their answer. Among the other securities exempt from county taxation were shares of stock in railroad corporations and bonds and stocks of certain other corporations which were subject to state but not to local taxation. The opinion plainly implied that the reasons of local policy for exempting these securities from local taxation were immaterial, saying that, if the principle of substantial equality between taxation of shares of national banks and taxation of other moneyed capital "operates to disturb the peculiar policy of some of the States in respect of revenue derived from taxation, the remedy therefor is with another department of the government, and does not belong to this court." [92]

---

[90] 113 U. S. 689, 5 Sup. Ct. Rep. 706 (1885).

[91] 113 U. S. 689, 702, 5 Sup. Ct. Rep. 706 (1885).

[92] 113 U. S. 689, 703 (1885). In reaching the decision that Congress meant to

This decision seemed to open the door, in every case where shares in national banks were taxed, to a judicial inquiry whether the state, by exempting any other kind of moneyed capital, had imposed a substantial inequality of burden on the shares. Two years later, however, this door was practically closed by the restricted interpretation put upon "moneyed capital" in *Mercantile National Bank* v. *New York*.[93] Mr. Justice Matthews for an undivided court [94] said that no attempt was made in *Boyer* v. *Boyer* [95] to define the term or to enumerate the various kinds of property and investments that came within its description. After referring to earlier decisions [96] he declared:

"It follows, as a deduction from these decisions, that 'moneyed capital in the hands of individual citizens' does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, ac-

---

forbid discrimination against shares of stock in national banks in favor of other property than shares of state banks, Mr. Justice Harlan calls attention to the act of 1864, which provided that the rate of tax on shares of national banks should not exceed that imposed on shares of state banks, and adds (page 691):

"But the Act of 1864 was so far modified by that of February 10, 1868, 15 STAT. AT L. 34, chap. 7, that the validity of such state taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in state banks. The effect, if not the object of the latter Act was to preclude the possibility of any such interpretation of the Act of Congress as would justify States, while imposing the same taxation upon national bank shares as upon shares in state banks, from discriminating against national bank shares, in favor of moneyed capital not invested in State bank stock. At any rate, the Acts of Congress do not now permit any such discrimination."

The learned justice then quotes the prohibition against assessing shares in national banks at a greater rate than that assessed on other moneyed capital. The natural implication from the quotation given above is that the act of 1868 substituted a more comprehensive prohibition against discrimination than that contained in the act of 1864. But the clause as to discrimination in favor of "other moneyed capital" was in the act of 1864 as well as in that of 1868. The latter act omitted the clause as to rates on shares of state banks. The only legitimate inference to draw from the difference in the statutes is that the lawmakers thought that discrimination in favor of shares of state banks was amply provided for in the clause preventing discrimination in favor of other moneyed capital, and that therefore the specific clause in the earlier statute was superfluous. The change in the statute throws no additional light on what was meant by "other moneyed capital."

[93] 121 U. S. 138, 7 Sup. Ct. Rep. 826 (1887).

[94] Mr. Justice Blatchford not sitting.

[95] Note 90, *supra*.

[96] People *v.* Commissioners, 4 Wall. 244 (1867); Lionberger *v.* Rouse, 9 Wall. 468 (1870); Hepburn *v.* School Directors, 23 Wall. 480 (1875); Adams *v.* Nashville, 95 U. S. 19 (1877).

cording to their respective corporate powers and privileges, in business, carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital." [97]

The true test, he says, "can only be found in the nature of the business in which the corporation is engaged." [98] And it is declared that by "other moneyed capital" Congress must have meant capital invested in some business that competes with the national banks.

"The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the Act of Congress is to be read in the light of this policy." [99]

The learned justice refers to railroad, mining and manufacturing companies and makes the point that the property of such corporations consists of real and personal property which, in the hands of individuals, no one would think of calling "moneyed capital." And from this he concludes:

"So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress

[97] 121 U. S. 138, 153, 7 Sup. Ct. Rep. 826 (1887).

[98] 121 U. S. 138, 154, 7 Sup. Ct. Rep. 826 (1887).

[99] 121 U. S. 138, 155 (1887). A little later, the opinion says: "But 'moneyed capital' does not mean all capital the value of which is expressed in terms of money. . . . Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money" (page 155). After describing the business of banking, Mr. Justice Matthews observes: "These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of the statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress" (page 156).

intended, in respect to these matters, to interfere with the power and policy of the States." [100]

It was held therefore that, however large may be "the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks. . . ." [101]

This restricted interpretation of "other moneyed capital" is directly at variance with that adopted in *Boyer* v. *Boyer* [102] and in the cases on the New York and Indiana statutes.[103] Though these latter cases are cited in the Mercantile Bank opinion for the proposition that the Act of Congress could not be evaded by unequal assessments on shares in national banks and other moneyed capital, no notice is taken of the significant fact that the "other moneyed capital" with which comparison was made was exclusive

---

[100] 121 U. S. 138, 156, 7 Sup. Ct. Rep. 826 (1887).

[101] 121 U. S. 138, 161 (1887). Earlier in the opinion, pages 160–61, Mr. Justice Matthews said: "It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally certain that they are not within the meaning of the Act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States." Then after quoting from Hepburn *v.* School Directors, note 110, *infra*, to the effect that "it could not have been the intent of Congress to exempt bank shares from taxation because some moneyed capital was exempt," the learned justice added: "The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares." This tempts one to ask: "When is other moneyed capital not other moneyed capital?" The answer seems to be: "When the discrimination in its favor is not unfriendly." The opinion seems to proceed along diverse and somewhat inconsistent lines of reasoning. It seems to declare that all exemptions of capital that do not compete with national banks are immaterial, since such capital is not "other moneyed capital" within the meaning of Congress. Yet it is implied that exemptions of capital which is not "moneyed capital" as thus defined may violate the congressional statute if they are unfriendly to national banks and not founded upon just reason. Deposits in savings banks are said to be "moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase," and yet their exemption is immaterial because savings banks do not compete with national banks. For suggestions of a different ground on which to sustain the case and those following it, see pp. 366, 367, *infra*.

[102] Note 90, *supra*.

[103] Notes 83–87, *supra*.

of capital invested in institutions which compete with national banks. And though the Boyer Case did not, it is true, enumerate the various kinds of property that come within the description of "other moneyed capital," it held explicitly that the term embraced other property than shares of state banks and savings institutions. Nor is the decision in the Mercantile Bank Case in any way justified by the precedents cited for the proposition that "other moneyed capital" does not necessarily embrace stock in all corporations whose capital is employed in business for pecuniary profit.

The first of these cases is *People ex rel. Duer* v. *Commissioners of Taxes*,[104] decided the next term after *Van Allen* v. *Assessors*.[105] In the Duer Case an owner of national bank stock complained of discrimination because he was allowed no deduction for the value of United States bonds owned by the bank, while individuals and corporations who were taxed on their property could deduct such federal securities as they owned. The complaint was rejected on the grounds (1) that the congressional statute applies only to the rate of assessment, and (2) that it has no reference to moneyed capital in the hands of corporations but only to that in the hands of individual citizens. This first ground was overruled in *People* v. *Weaver*,[106] decided fourteen years later. The second ground was not applicable to the Mercantile Bank Case, because the exemptions there objected to included shares of stock and other capital in the hands of individuals. The Van Allen Case of course established that an owner of stock in a national bank must pay taxes on the value contributed by the federal securities owned by the bank, although an owner of the securities does not. No exemptions are allowed to owners of stock in corporations holding such bonds. The opinion in the Duer Case points out that Congress, when it permitted the taxation of shares in national banks but forbade discrimination against them, was well aware that federal securities were exempt from direct taxation. The argument of the complainant, says Mr. Justice Nelson, proves either that Congress meant that federal securities should be subject to taxation in the hands of their owners, or else that the deduction of such securities from taxes on property "should operate as a violation of the rate of the tax prescribed" in the statute permitting taxation of national

[104] 4 Wall. 244 (1867). [105] Note 58, *supra*. [106] Note 79, *supra*.

bank shares. "We dissent," he says, "from both conclusions." [107] The point of the Duer Case is that exemption of federal securities from direct taxation does not make a tax on the full value of national bank shares violate the requirement that such taxation shall not be "at a greater rate than is assessed on other moneyed capital." This is but to say that, if the banks as federal instrumentalities are not embarrassed by taxation of the full value of their shares, the situation is not changed because another federal instrumentality — *i. e.*, United States bonds — escapes direct taxation. It is not to say that Congress, because it meant to exclude United States bonds from the "other moneyed capital" which the State must tax at the same rate as shares in national banks, meant also to exclude shares in all corporations which did not compete with national banks. Moreover, though United States bonds escape direct taxation, they may be included in the measure adopted for assessing franchises and shares of corporations. This was declared in the opinion in the Duer Case in dealing with *Mead* v. *Commissioners*,[108] in which an owner of state bank stock was denied deduction for the value of federal securities owned by the bank. Had such deduction been granted to owners of stock in state banks and other corporations, and denied to owners of national bank stock, there would be a discrimination analogous to that held invalid in *People* v. *Weaver*.[109]

Another case cited in the Mercantile Bank opinion is *Hepburn* v. *School Directors*.[110] This held that it was not a discrimination against shares in national banks to assess them at their market value, although money at interest was assessed at its par value, since what is taxed in the case of the share is not money at interest, but the stockholder's interest in the money of the bank, which may

[107] 4 Wall. 244, 257 (1867).

[108] 4 Wall. 244, 258 (1867). No separate opinion was rendered in this case, or in ten other cases decided at the same time as the Duer Case and disposed of in the opinion in that case. The majority said that the general question involved in Mead *v.* Commissioners "was distinctly presented in the bank cases of the last term of which Van Allen *v.* Assessors was one of the class, and disposed of." This neglects the fact that the opinion in the Van Allen Case went on the ground that Congress granted to the states express permission, not only to tax the shares of national banks, but to assess them at their full value, including that contributed by federal securities owned by the bank. See p. 339, *supra*.

[109] Note 79, *supra*.

[110] 23 Wall. 480 (1875).

be greater or less than the sums put in by the stockholders. The Hepburn case held also that exemption of mortgages, moneys owing on agreements for the sale of real estate, etc., from local taxation did not operate to discriminate against shares in national banks, since such exemption was partial only and was "evidently intended to prevent a double burden by the taxation both of property and the debts secured upon it." [111] The economic value behind these debts was taxed, and to tax both the debts and the property on which they were secured would impose double the burden that is placed on the shares of national banks or the elements of value behind them. The Hepburn opinion, it is true, observed that "it could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt." [112] But this is only to say that some exemptions do not prevent the "substantial equality" required by the statute. The statement quoted above must be taken in connection with the remark in an earlier part of the opinion to the effect that "money at interest" is not the only moneyed capital included in the term as used by Congress. "The words are 'other moneyed capital.' That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stock and securities might be included in that descriptive term." [113]

Lionberger v. *Rouse*,[114] which is also cited in the Mercantile Bank opinion, arose under the provision in the Act of 1864 that the rate on shares of national banks should not exceed that imposed on shares of state banks. There were two state banks in Missouri which, by contract contained in their charter, could be taxed only one per cent on their capital stock. This was less than the rate imposed on shares of national banks. The Supreme Court recognized that the discrimination came within the letter of the congressional prohibition, but insisted that it was not within its spirit, because Congress could not have intended "such an absurd thing as that the power of the State to tax should depend on its doing an act which it had bound itself not to do." [115] Reference was also made to the fact that these two banks "hold a very inconsiderable portion of the banking capital of the State, and that the shares of

[111] 23 Wall. 480, 485 (1875).
[112] *Ibid.*
[113] 23 Wall. 480, 484 (1875).
[114] 9 Wall. 468 (1870).
[115] 9 Wall. 468, 475 (1870).

all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in national banks." [116] The case evidently depends on its own special facts. The court declares also that the provision in the Act of 1864 under which the case arose refers only to banks of issue and not to banks of deposit. Since this portion of the statute was soon repealed, and since the continuing provision as to "other moneyed capital" is held to include shares of stock in other state banks than banks of issue, this point in the decision, whether sound or questionable, is unimportant. The opinion in the Mercantile Bank Case is therefore unwarranted in relying on the quotation from the Lionberger Case to the effect that "there was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation." [117]

The other case cited in the Mercantile Bank opinion is *Adams* v. *Nashville*,[118] from which the following quotation is made:

> "The Act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the Legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture (the six plates, six knives and forks; six teacups and saucers of the old statutes), the property of clergymen to some extent, school houses, academies and libraries are generally exempt from taxation. The discretionary power of the Legislatures of the States over all these subjects remains as it was before the Act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing power." [119]

But this statement was not at all necessary to the decision in the Adams Case. The two objections there made were to the exemption of capital in state banks and of bonds of municipal corporations. As to the former the court said that the exemption of the capital stock was immaterial since the shares of stock were taxed to their owners. And as to the latter, it was said that it did not

[116] 9 Wall. 468, 474 (1870).
[117] *Ibid.* Quoted in 121 U. S. 138, 150 (1887).
[118] 95 U. S. 19 (1877).
[119] 95 U. S. 19, 22 (1877). Quoted in 121 U. S. 138, 151 (1887).

appear that the municipal bonds were in fact exempt. There was therefore no occasion for Mr. Justice Hunt to say in the opinion in the Adams Case that the Act of Congress was not intended to curtail the state power on the subject of taxation. Of course the Act did not mean to prevent a state from doing as it pleased with regard to subjects over which it has complete control. But plainly it meant to qualify the permission to tax shares of national banks, by the requirement that they should not be assessed at a greater rate than other moneyed capital. Therefore the action of the state with respect to matters within its control was made the test of the propriety of action with respect to matters without its control, except to the extent permitted by Congress. The general statement quoted from the Adams opinion is opposed to the statements in the Boyer opinion eight years later. The Mercantile Bank Case, in declaring that "other moneyed capital" meant only capital which competes with national banks, made new law.

The decisions of the Supreme Court following the Mercantile Bank Case have not uniformly rested on the ground of this restricted interpretation of moneyed capital. In *Whitbeck* v. *Mercantile National Bank*,[120] where all bank stocks were assessed at sixty-five per cent of their full value and other property at sixty per cent, the Supreme Court said that "the discrimination against national banks, as compared with other moneyed capital is established," and sustained an injunction against collecting the full amount of the tax on the shares of national banks.[121] The court also held that the bank was entitled to relief in respect to the tax on certain stock whose owners had not been allowed to deduct their indebtedness from the assessment. The objection that the demand for the deduction was not seasonably made is dismissed on the ground that "the laws of Ohio make no provision for the deduction of the *bonâ fide* indebtedness of any shareholder from the shares of

---

[120] 127 U. S. 193, 8 Sup. Ct. Rep. 1121 (1888).

[121] Another ground for the decision is that it appeared that the State Board of Equalization had no power under the Ohio statute to equalize assessments of bank stocks with those of other property, but only to "diminish or increase the assessed value of the shares of stock by such a per centum as will make them equal among themselves." While this unwarranted action by the state board would be a sufficient ground for declaring invalid the tax on the shares in national banks, it would not necessarily involve a federal question. The opinion indicates that the decision would not have been different had the state statute authorized the action of the state board.

his stock, and provide no means by which said deduction can be secured." [122] This language clearly implies that no deduction of debts was allowed from the assessment of any bank stocks, state or national. But in *First National Bank of Wellington* v. *Chapman*[123] the Whitbeck Case was distinguished on the ground that the court had "assumed that under the statute of Ohio, owners of all moneyed capital other than shares of national banks were permitted to deduct" their indebtedness.[124] And the opinion in the Chapman Case declares explicitly that so long as shares in state and national banks are taxed alike, deduction of debts from assessment of "credits" that do not enter into competition with national banks is immaterial.

Three years earlier, however, the opinion in *First National Bank of Garnett* v. *Ayers* [125] had failed to take the broad ground that stock in institutions that compete with national banks is all that is embraced within the term "moneyed capital." This case, too, involved a statute permitting deduction of debts from assessment of "credits" but not from assessment of any bank stock. The reason given for the decision was that it did not appear how extensive were the deductions allowed for debts in assessing other property. The court said that to come to a decision in favor of the plaintiff in error it would be necessary to take judicial notice of the fact claimed by counsel "that the amount of moneyed capital in the state of

[122] 127 U. S. 193, 199, 8 Sup. Ct. Rep. 1121 (1888).

[123] 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

[124] 173 U. S. 205, 220 (1899). It is almost certain that no such assumption was made in the Whitbeck Case. The opinion in that case speaks of "shareholder" and "shares of stock" without any qualifying terms. Moreover, the other discriminations in the case were plainly between all bank stocks on the one hand and other property on the other. From section 2762 of the Revised Statutes of Ohio in force on January 1, 1886, it appears that shares of stock "in any incorporated bank or banking association . . . whether now or hereafter incorporated or organized under the laws of this state or of the United States" are treated alike. No deduction for debts seems to be allowed from any property subject to taxation except in the case of what is termed "credits." Provision for such deduction is made in section 2730 in which it is said that "the term 'credits' shall be held to mean the excess of the sum of all legal claims and demands . . . over and above the sum of legal *bonâ fide* debts owing by such person." It is worthy of note too that the complainant in the Whitbeck Case was excused for not having requested the deduction of his debts on the authority of Hills *v.* National Albany Exchange Bank, note 85, *supra,* in which there was no discrimination between national and state banks as to deduction of indebtedness from assessments of their shares.

[125] 160 U. S. 660, 16 Sup. Ct. Rep. 412 (1896).

Kansas from which debts may be deducted, as compared with the moneyed capital invested in national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders." [126] This the court declined to do. It said that "the single fact that the statute of Kansas permits some debts to be deducted from some moneyed capital, but not from what is invested in the shares of national banks, is not sufficient. . . ." [127] The "moneyed capital" which the court had in mind must have been other property than shares in state and national banks.

So also, in the most recent case on the subject, the court does not base its decision on the ground that no property that does not compete with national banks is "moneyed capital." This is *Amoskeag Savings Bank*,[128] in which a New Hampshire bank, owning stock in a New York national bank objected to the New York assessment of its shares because it was not allowed to deduct from the assessment an amount equal to its debts, which were in fact greater than the value of its stock. From all property except stock in state and national banks such deduction was allowed. The complainant relied on *People* v. *Weaver*.[129] Mr. Justice Pitney distinguished the case on the ground that the New York statute there involved taxed bank stock in the same manner as all other property, while the later New York statute involved in the Amoskeag Case had a different method of assessing bank stock from all other property. By that statute shares of stock in state and national banks were taxed at one per cent except in towns where the local rate was less. All other property was subject to varying local rates of assessment, which were usually higher than one per cent. The learned justice quotes at length from the opinion in the Mercantile Bank Case, but makes no further comment thereon than that "the rule of construction thus laid down has since been consistently adhered to by this court." [130] He fails to state that the Mercantile Bank Case overrules the Weaver Case to the extent of holding that no comparison may be made between the assessment of bank shares and of other property that does not

[126] 160 U. S. 660, 667, 16 Sup. Ct. Rep. 412 (1896).

[127] 160 U. S. 660, 667–68, 16 Sup. Ct. Rep. 412 (1896).

[128] 231 U. S. 373, 34 Sup. Ct. Rep. 114 (1913).

[129] Note 79, *supra*.

[130] 231 U. S. 373, 391, 34 Sup. Ct. Rep. 114 (1913).

compete with bank shares. The important part of the opinion is as follows:

"Nor can we say that the taxing scheme contravenes the limits prescribed by Sec. 5219, Rev. Stat. merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise." [131]

The vice in the contention to the contrary was said to be that it insists that "Sec. 5219 deals with the burden of the tax on the individual shareholder, rather than upon shareholders as a class." [132] The opinion points out that, since bank stocks are assessed at a lower rate than other property, the deduction of debts from such other property is not likely to make the assessment of that other property discriminate against bank stocks, and says that, if the contrary is true in general, the complainant must allege and prove it.[133] Thus it seems that the court thought that intentional and general discrimination against stocks of national banks and other banks in favor of property not competing with national banks would come within the limitations of the federal statute. Nevertheless in this and the other cases on the subject the Mercantile Bank Case is quoted with approval. But at the same time a number of the opinions seem to treat the rule of the Mercantile Bank Case with respect to the definition of "other moneyed capital" as a rule *nisi* and not a rule absolute.

But in dealing with exemptions of other property from taxation

---

[131] 231 U. S. 373, 393, 34 Sup. Ct. Rep. 114 (1913).

[132] *Ibid.*

[133] "There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares — by adopting 'book values' — which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous." 231 U. S. 373, 392–93 (1913). And in considering the contention of the complainant that the statement of the New York court that "when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital" is a mere surmise, Mr. Justice Pitney says: "We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxing system discriminates in fact against holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made" (page 393).

reliance has usually been placed on the restricted definition of "other moneyed capital."[134] In *Bank of Redemption* v. *Boston*,[135] an alleged discrimination against shares in national banks in favor of shares in trust companies, insurance companies and in a telephone company was held immaterial, since "the interest of individuals in these institutions is not moneyed capital" and "the investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State."[136] In *First National Bank of Aberdeen* v. *County of Chehalis*,[137] it was alleged in the bill that there was exempt in the county loans and securities due from residents to residents, to an amount in excess of $237,400, and in the state outside of the county over $14,000,000 of loans and securities due from residents to residents, and at least $26,000,000 of stocks and bonds of insurance, wharf and gas companies, while the total capitalization of all national banks in the state was only $7,000,000. A demurrer to the bill was sustained for the reason that, under the prior decisions of the court, since the capital exempted did not come into competition with national banks, it is not within the meaning of "other moneyed capital" as that term was used by Congress.[138] But Justices Harlan, Brown and White dissented, being of opinion that "the bill makes a *prima facie* case of illegal discrimination against capital invested in national bank stock."[139] The majority seemed to

[134] In addition to the cases here considered, see Newark Banking Co. *v.* Newark, 121 U. S. 163, 7 Sup. Ct. Rep. 839 (1887); Palmer *v.* McMahon, 133 U. S. 660, 10 Sup. Ct. Rep. 324 (1890); and Talbott *v.* Silver Bow County Commissioners, 139 U. S. 438, 11 Sup. Ct. Rep. 594 (1891).

[135] 125 U. S. 60, 8 Sup. Ct. Rep. 772 (1888). This case held also that a state could tax the shares of a national bank even when owned by other national banks.

[136] 125 U. S. 60, 68, 8 Sup. Ct. Rep. 772 (1888).

[137] 166 U. S. 440, 17 Sup. Ct. Rep. 629 (1897).

[138] "The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments, and investments in mortgages does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks; and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by U. S. Rev. Stat. § 5219." 166 U. S. 440, 460–61 (1897).

[139] 166 U. S. 440, 462, 17 Sup. Ct. Rep. 629 (1897).

think that possibly some of the loans and securities held by citizens of the country might be "moneyed capital," but nevertheless sustained the demurrer on the ground that "as against the pleader, we may well assume that they belong to a class of investments which does not compete with the business of national banks." [140]

Though somewhat varying reasons have been given for the decisions subsequent to the Mercantile Bank Case, the Whitbeck Case is the only one in which the Supreme Court has invalidated a tax on shares of national banks where the discrimination in favor of other moneyed capital was not in favor of shares in state banks. In only two other cases has the charge of discrimination been sustained. In *San Francisco National Bank* v. *Dodge*[141] the majority of the court found that, while the assessment of shares of stock in national banks included the elements of value contributed by "good-will, dividend earning power, the ability with which the corporate affairs were managed, the confidence reposed in the capacity and permanence of tenure of the officers, and all those other indirect and intangible elements of value which enter into the estimate of the worth of the stock, and help to fix the market value or selling price of the shares," [142] the taxation of state banks on their property only, with exemption of their shares, did not take account of these intangible elements of value. A bill to restrain the enforcement of taxes on the shares of the national banks was therefore sustained.

---

[140] 166 U. S. 440, 461, 17 Sup. Ct. Rep. 629 (1897). This assumption as to the loans and securities and possibly also the decision as to stocks of insurance companies seem to be inconsistent with the statement in the Mercantile Bank Case as to what was included in the term "moneyed capital." In the opinion in that case in 121 U. S. 138, 157, Mr. Justice Matthews says: "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property." In deciding what property comes into competition with national banks, some of the later cases have given in effect an even more restricted interpretation of "other moneyed capital" than was put forward in the Mercantile Bank Case. See p. 363, *infra*.

[141] 197 U. S. 70, 25 Sup. Ct. Rep. 384 (1905).

[142] 197 U. S. 70, 80, 25 Sup. Ct. Rep. 384 (1905).

The minority, consisting of Mr. Justice Brewer, who wrote the dissenting opinion, Chief Justice Fuller and Justices Brown and Peckham, differed from their brethren with respect to the values reached by the method of assessing state banks, and with respect to the propriety of equitable relief. In *Covington* v. *First National Bank*,[143] a retroactive provision in a Kentucky statute, relating solely to shares of stock in national banks, by which such banks were charged with liability for taxes for past years, was also held an invalid discrimination against shares of national banks. These two discriminations related to liability to taxation and to methods of valuation.

With respect to variations in the methods of assessing shares in national banks and other property that admittedly comes into competition with national banks, the court has required complainants to show that the variation in methods actually operates to discriminate. In *Davenport National Bank* v. *Board of Equalization* [144] the proposition of counsel that savings banks and national banks must be taxed in the same way was explicitly negatived. "The Act of Congress does not require a perfect equality of taxation between state and national banks, but only that the shares of national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals." [145] In *First National Bank of Wellington* v. *Chapman*[146] complaint was made of discrimination in favor of unincorporated bankers, because they were allowed to deduct their debts, while owners of national bank shares were not. But the court found that the only debts so deducted were those incurred in the banking business, and that the deduction of such debts was necessary to determine the real value of the capital employed by the unincorporated banker. The provision that the shares of national banks should be listed at their true value in money was held to require the deduction of the liabilities of a national bank from its resources in the assessment of its shares, so that there was no discrimination in favor of the unincorporated banker.

"That mathematical equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless

[143] 198 U. S. 100, 25 Sup. Ct. Rep. 562 (1905).
[144] 123 U. S. 83, 8 Sup. Ct. Rep. 73 (1887).
[145] 123 U. S. 83, 85, 8 Sup. Ct. Rep. 73 (1887).
[146] 173 U. S. 205, 19 Sup. Ct. Rep. 407 (1899).

and idle to attempt it. Equality, so far as the differing facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality we think is reached under this system." [147]

The fact that unincorporated bankers were not assessed for franchise value while shares of national banks included such value was held to be immaterial, since such value existed in the case of national banks and did not exist in the case of unincorporated bankers. And in *Amoskeag Savings Bank*,[148] in dealing with deductions for debts, Mr. Justice Pitney said of the federal statute:

"The language clearly prohibits discrimination against shareholders in national banks, and in favor of shareholders in competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual." [149]

The opinion in the Amoskeag Case says also that "the holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder." [150] Thus trust companies are assumed to be institutions which compete with national banks. In *Jenkins* v. *Neff*,[151] however, decided eleven years earlier, the Supreme Court dismissed an alleged discrimination in favor of trust companies on the ground that, since the New York statute did not give to New York trust companies "power to loan, discount or purchase paper," they were not in competition with national banks.[152] It was suggested by complainant that in fact they exercised those powers. But the court answered that it would assume that the state would take proper steps to keep the trust companies within their proper limits, and that a neglect for a limited time cannot be deemed an assent by the state to an improper assumption of power. The opinion in the Supreme Court did not state the discriminations

---

[147] 173 U. S. 205, 216, 19 Sup. Ct. Rep. 407 (1899).

[148] Note 128, *supra*.

[149] 231 U. S. 373, 393–94, 34 Sup. Ct. Rep. 114 (1913).

[150] 231 U. S. 373, 391–93, 34 Sup. Ct. Rep. 114 (1913).

[151] 186 U. S. 230, 22 Sup. Ct. Rep. 905 (1902).

[152] This view of trust companies was also taken in Bank of Redemption *v.* Boston, note 135, *supra*. The statement in that case had reference to exemption of the shares of stock in trust companies as well as of their capital.

alleged, but from the opinions in the same case in the Appellate Division and Court of Appeals of New York [153] it appears that objection was made to the fact that trust companies were allowed to deduct from the assessment of their capital an amount equivalent to their investment in non-taxable securities, while owners of stock in national banks had no corresponding privilege. Such a contention of course denies the validity of the distinction between taxes on shares and taxes on capital, which was asserted in the Van Allen Case [154] and has been consistently followed.[155] The contention also denies the position that taxes on the capital of corporations are not taxes on moneyed capital in the hands of individual citizens.[156] So there were two established grounds upon which to reach the decision in *Jenkins* v. *Neff* without declaring in effect that no discrimination whatever in favor of trust companies would be within the limitation in the congressional permission to tax shares of national banks. But this seems to be the doctrine of the case in both the Supreme Court and the state courts. The opinion in the New York Court of Appeals relied on a quotation from the opinion in the Mercantile Bank Case to the effect that "it is evident, from this enumeration of powers [conferred by the New York statute] that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." [157] But that declaration in the Mercantile Bank opinion is followed by the statement that the trust companies deal in money and securities "in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress." [158]

[153] Jenkins *v.* Neff, 62 N. Y. Supp. (96 N. Y. St. Rep.) 321 (1900); *id.*, 163 N. Y. 320 (1900).

[154] Note 58, *supra.*

[155] See cases cited in notes 62 and 108, *supra.*

[156] See cases cited in notes 104 and 135, *supra.*

[157] 121 U. S. 138, 159, 7 Sup. Ct. Rep. 826 (1887). Quoted in 163 N. Y. 320, 329.

[158] 121 U. S. 138, 159 (1887). In applying this to the facts in the Mercantile Bank Case the court said: "But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon the shares of stock in national banks." The reason given was that the capital of trust companies is required to be assessed at its actual value which "is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole number of shares." It is recognized, however,

It is apparent from the foregoing review that the Supreme Court has not been uniformly satisfied to rest its decisions upon a legal definition of the term "other moneyed capital" as used by Congress. The unusual definition evolved in the Mercantile Bank Case was evidently the product of economic considerations. It was due to a desire to exclude formal legal discriminations which did not in fact operate to the disadvantage of national banks as instrumentalities of the national government. The normal meaning of "other moneyed capital" was disregarded in favor of an artificial meaning that took into account economic considerations which the court thought must have been in the mind of Congress. Yet in applying this restricted definition of "other moneyed capital," the opinion in the Mercantile Bank Case was not wholly consistent with itself. For it calls municipal bonds and deposits in savings banks "moneyed capital," [159] and still dismisses their exemption as immaterial. The court then, as later, labored under difficulties in relying exclusively and consistently on its legal definition of "other moneyed capital."

---

that "from this are to be deducted, of course, the real estate of the corporation, otherwise taxed, and the value of such part of the capital stock as is invested in non-taxable property, such as securities of the United States." Such deductions from taxation of capital stock of state banks was held in Van Allen *v.* Assessors, note 78, *supra*, to render the tax on the capital of the state banks not equivalent to the tax on the shares of national banks. The opinion in the Mercantile Bank Case on the point under consideration does not refer to the Van Allen Case, or answer the objection there sustained, except by indirection. It states as a fact that, in addition to the tax on the capital of a trust company, the corporation pays to the state "as a state tax, a tax upon its franchise based upon its income; the tax on the capital being for local purposes." Whether this resulted in imposing on trust companies taxes equivalent to those on shares of stock in national banks would of course depend upon whether the actual amount of the tax on the franchise was equivalent to the deduction from the tax on the capital by reason of the holdings of United States bonds.

[159] "Bonds issued by the State of New York, or under its authority by its public municipal bodies . . . are not taxable even by the United States. . . . Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares." 121 U. S. 138, 162, 7 Sup. Ct. Rep. 826 (1887).

"However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individuals otherwise subject to taxation." 231 U. S. 157, 161, 34 Sup. Ct. Rep. 46 (1913). See also note 101, *supra*.

Perhaps a more acceptable ground for decisions involving exemptions, deductions of debts, and variations in methods of assessment other than in rates of levy would be that such alleged discriminations are not within the letter of the prohibition against taxing national bank shares "at a greater rate" than other moneyed capital, and that whether such alleged discriminations come within the spirit of the statute must depend on whether their effect is to impose a substantial discrimination against money invested in national banks. Common-sense would then require the court to hold that the exemption of any particular legal *res* was unimportant so long as there was taxation of the economic value behind that *res*. Exemption of shares of stock is therefore unimportant when there is taxation of the franchise and capital of the corporation.[160] Exemption of the franchise and capital is unimportant where there is taxation of the shares.[161] Exemption of mortgages or money due for the sale of real estate is unimportant, so long as the real estate or other property mortgaged is taxed.[162] Exemption of federal securities could be disregarded because the federal government would suffer less from the taxation of only one of its instrumentalities than from the taxation of two.[163] Exemption of state and municipal securities could be disregarded, because the exemption affects the rate at which the state may borrow.[164] If the securities were taxable they would bear a correspondingly higher rate of interest and the net result to the individuals and to the state would be substantially similar to the effect of their exemption. Exemption of deposits could be disregarded because the banks are taxed on the investments made with those deposits.[165] And such other exemptions or variations in methods of assessment as might appear in the taxing laws of any state could doubtless be excused on the ground that they were so slight as not to interfere with the substantial equality between assessment of shares in national banks and that of other moneyed capital.[166] The only burden that can be imposed on national banks is through taxation

[160] Amoskeag Savings Bank, note 150, *supra*.

[161] Adams *v.* Nashville, note 118, *supra*.

[162] Hepburn *v.* School Directors, note 111, *supra*.

[163] People *ex rel.* Duer *v.* Commissioners of Taxes, note 104, *supra*.

[164] Mercantile National Bank *v.* New York, note 159, *supra*.

[165] *Ibid.*, note 93, *supra*.

[166] See cases cited in notes 111, 114, 125 and 128, *supra*.

of their real estate and their shares of stock. So long as substantially equivalent burdens are imposed on all other economic values by taxation of tangible property and of the capital and franchises of corporations, it would be absurd to insist that the exemption of one or more of the legal forms of property in which those values may be represented, results in taxing shares in national banks at a greater rate than that imposed on other moneyed capital. The rule of the Mercantile Bank Case practically comes down to a disregard of formal legal discrimination where there is in fact no substantial economic discrimination.

The cases on the subject under discussion prevent a state from imposing heavier burdens on shares in national banks than on shares in state banks. But the attempts of the state are frustrated, not because they would hamper the power of the national government to borrow money, but because, by encouraging capital to invest in state banks rather than in national banks, they would interfere with the latter as instrumentalities of the national government. And the only question which has been considered was whether the discriminations alleged came within the prohibition of Congress. The point that, owing to the large holdings of United States bonds in the vaults of the national banks, the state may by indirection impose heavier burdens on investments in federal securities than on other forms of property is not discussed.[167] This point raises a problem which arises independently of the question whether any method of taxation interferes with the banks as instrumentalities of government. And the solution must be sought, not in the language of a congressional enactment,

[167] The nearest approach to a discussion of this question is in Jenkins *v.* Neff, note 151, 236–37, *supra*, where Mr. Justice Brewer quotes from the opinion of the same case in the appellate division of New York some remarks, which he says "in general we approve." In the appellate division Judge Woodward said: "The fact that in a given instance, by reason of an exercise of discretion as to the particular kind of securities purchased, a trust company may have a real or imaginary advantage over investors in the shares of national banks is not a sufficient foundation for declaring the assessment invalid." (Quoted from 62 N. Y. Supp. 321, 327.) And then he adds: "If the state refused to allow its trust companies to invest in United States securities there might be a far greater cause for grievance." (Quoted from 62 N. Y. Supp. 321, 328.) Any such cause for grievance would of course be a discrimination, not against national banks as federal instrumentalities, but against the federal borrowing power. And heavier state taxation of shares and franchises of corporations owning federal securities than of those of corporations not owning such securities would differ only in degree from prohibition of investment in such securities.

but in principles inhering in the federal system of government. Only by inference and analogy do the cases on the interpretation of the statute of Congress touch the question whether the imposition of heavier burdens on the franchises and shares of corporations owning federal securities than on other intangibles or on chattels and real estate can be regarded as an interference with the power of the United States to borrow money.

Yet the inference and the analogy are unescapable. If shares of stock in national banks whose capital is invested largely in federal securities may be taxed more heavily than other legal forms of property, manifestly the state may discriminate in like manner against the franchises and shares of other corporations owning federal securities. For, in the former instance, the discrimination may be adduced as an interference with two functions of the national government, whereas in the latter the question can be raised only with respect to one. It may therefore be taken as established that exemption of many kinds of property from state taxation does not deprive the state of power to tax franchises and shares of corporations having investments in federal securities.

Had the Supreme Court followed the implications of its declarations in *Boyer* v. *Boyer*,[168] it would have been compelled to pass judgment on the almost innumerable details of the taxing system of every state. The states would doubtless have been driven to abandon any attempt to tax shares of stock in national banks. The silence of Congress after the restricted interpretation put upon the phrase "other moneyed capital" is sufficient ratification of the existing rule as to taxation of shares in national banks. And this applies *a fortiori* to the absence of any rule that taxation of shares in corporations owning federal securities must be accompanied by similar taxation of all other forms of property. Any possible discrimination against the federal borrowing power is one that Congress might in all probability by direct legislation prevent. Congress evidently is satisfied with the exemption of United States bonds from direct taxation. This exemption, coupled with the fact that corporations engaged in mining, manufacturing, trade and transportation are almost invariably taxed, both on their franchises and on all their property with the exception of that invested in public securities, makes the absence of any tax on

---

[168] Note 90, *supra*.

their shares of stock of little practical importance. The value invested in federal securities may be molested only by taxation of the franchises and shares of stock of corporations which may own such securities. Such securities in the hands of individuals contribute nothing to the state fisc. Those in the hands of corporations cannot be taxed directly. In view of the extent to which individuals and corporations are taxed on all other kinds of property, it is most unlikely that exemptions here and there allowed, operate in any way to obstruct or discriminate against the federal borrowing power. Such occasional and isolated inequalities as may exist to the disadvantage of property which derives its value from United States bonds must be greatly outweighed by the aggregate of the many burdens borne by property in no way related to any interest of the federal government. The theoretical possibility of discrimination left open by the decisions is not destined to be realized in the actual results of the fiscal policy of any state.

4. *Summary and Conclusion*

In dealing with the problem whether taxes on shares of stock in national banks violate the permission granted to the states by Congress, the Supreme Court has avoided a dryly literal interpretation of the federal statute. It has expanded the words "at a greater rate" to make them include all forms of discrimination, and has restricted the natural meaning of "other moneyed capital" to confine it to capital which comes into fairly direct competition with national banks. In determining the significance of alleged discriminations in favor of other property, it has not been content to observe merely whether the state has failed to impose an equal burden on some other legal *res* which the law calls property and which in general it would call moneyed capital. In expanding one phrase of the statute and contracting the other, the judges have looked through legal form to economic substance. Any interpretation of "other moneyed capital" which excludes money loaned at interest or invested in insurance companies and trust companies must be due to other than verbal considerations. Nor is such an interpretation the product of an analysis of the legal characteristics of the property so excluded. It is reached by considering the economic relations of such property to that invested in national banks. The court has been concerned with

economic effects rather than with legal names, though it has felt compelled to label those economic effects according to legal nomenclature. As has been pointed out, this was not a necessary mode of procedure. Most of the alleged discriminations with which the court has had to deal have not fallen within the express terms of the limitations imposed by Congress. In deciding the cases which did not involve variations of rates where there were similar methods of assessment, the court could have sustained the tax on the shares of national banks without denying that the property with which the shares were compared was moneyed capital. The same decisions could have been reached by informing the complainant that he had not brought himself within the letter of the statute, and that by reason of economic considerations he had not brought himself within its spirit. The fact that the court has chosen to call its inquiry an interpretation of the meaning of language should not blind us to the considerations which have controlled its decisions. It has really been concerned, not with the legal characteristics of the property adduced for comparison, but with what gave value to that property.

When, however, we turn to the cases where no complaint is made of discrimination against a federal instrumentality, we find the legal characteristics of the subject taxed, of more controlling importance. As the law now stands, the test of whether a state tax is an interference with the federal borrowing power, is what subject is taxed, and not what gives value to the subject taxed or what determines the amount of the tax. The capital of a corporation is treated as but a name for the property of the corporation.[169] So a tax on the capital is a tax on the property in which it is invested. To the extent that such property consists of federal securities, it is totally outside the taxing power of the state. The shares of stock are a kind of property totally distinct in law from the property of the corporation. A tax on such shares is not removed from the power of the state even though its economic effect on the borrowing power of the United States is indistinguishable from that of a tax on the capital of the corporation or specifically on United States securities.

[169] "The capital stock is nothing; a myth; a mere name, excepting in so far as it is represented by investments made with the money paid into the treasury of the corporation on account of such capital stock." Mr. Justice Paxon, in Appeal of Fox & Wife, 112 Pa. St. 337, 554, 4 Atl. 149 (1886).

This legalistic formalism appears subversive of the very basis on which rests the doctrine of the exemption of federal instrumentalities from state taxation. As Mr. Justice Strong said in *Railroad Company* v. *Peniston:* [170]

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax;* that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." [171]

All this applies *mutatis mutandis* to the exemption of federal securities from state taxation. Such exemption should depend, not on the nature of the property named by the state as the subject on

---

[170] 18 Wall. 5 (1873).

[171] 18 Wall. 5, 36 (1873). Italics are author's. The economic argument was here used, however, to determine whether the subject on which the tax was levied could be regarded as a federal instrumentality. It was held that a tax on the property of a railroad corporation chartered by the federal government and subject to a large degree of control by the federal government was not an interference with the exercise of any power belonging to the federal government, and therefore not a tax on a federal instrumentality. The majority distinguished McCulloch *v.* Maryland (4 Wheat. 316) and Osborn *v.* Bank (9 Wheat. 738) on the ground that the taxes there held invalid were on the operations of a federal agency, and not on the property of a federal agent. Mr. Justice Bradley for the minority insisted that the relation between the Union Pacific and the federal government was such that the property of the road was an agency of the government. He argued that, if the roadbed might be taxed, it might be sold for non-payment of the tax and that this would prevent the road from fulfilling its obligations to the federal government. To tax the roadbed, he said, is to tax the very instrumentality which Congress desired to establish, since the track is as essential to the operations of the road "as the use of a currency, or the issue or purchase of bills of exchange is to the operations of a bank." The dispute between the majority and the minority was not whether a tax on a proper subject was invalid because of the inclusion of improper elements in assessing its value, but whether the subject taxed was itself an agency of the federal government.

In accord with Railroad Company *v.* Peniston, in sustaining taxes on property privately owned but used in performing services for the United States, are Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904) and Gromer *v.* Standard Dredging Co., 224 U. S. 382, 32 Sup. Ct. Rep. 499 (1912). See also Ackerlind *v.* United States, 240 U. S. 531, 36 Sup. Ct. Rep. 438 (1916). State taxes have been held void where the subject taxed was a franchise obtained from the United States, California *v.* Central Pacific Railroad Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888), or included the business of sending telegraph messages for the United States, Williams *v.* Talledega, 226 U. S. 404, 33 Sup. Ct. Rep. 116 (1912). For a case declaring invalid a method of collecting a valid tax because the method interfered with an instrumentality of the national government, see Western Union Telegraph Co. *v.* Massachusetts, 125 Mass. 530 (1888).

which the tax falls, but on the effect of the tax. Otherwise the state by legislative legerdemain may make a tax on a federal instrumentality seem to be something different from what it really is, and thus do indirectly what it is forbidden to do directly.

It may, however, be doubted whether the Supreme Court has been as unmindful of economic considerations as some of its declarations would imply. It may be that the effect of the tax varies with the kinds of property on which it is levied. It may be also that the effect of the taxes which have been declared invalid was not so serious as was supposed and that the court has adopted technical legal distinctions in order to limit as narrowly as possible the economic effect of the earlier decisions. It is possible, too, that any decision on the subject under consideration must be in the nature of a somewhat arbitrary compromise between maintaining the interests of the nation and yet not unduly restricting the resources of the state. These suggestions will again be adverted to after consideration has been given to the cases on state taxation as an indirect regulation of interstate commerce.

(*To be continued.*)

Thomas Reed Powell.

COLUMBIA UNIVERSITY.